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Supreme Court of the United States

OCTOBER TERM, 1965

No. 557

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

and

ANTHONY ALBANESE,
Co-Petitioner,

against

N. V. NEDERL. AMERIK STOOMV. MAATS.,
Respondent.

BRIEF IN OPPOSITION TO PETITION OF INTERNATIONAL TERMINAL OPERATNG CO., INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The opinion of the Court of Appeals for the Second Circuit, filed June 15, 1965, is reported at 346 F. 2d 481.

Jurisdiction

While jurisdiction may exist under 28 U.S.C. Sec. 1254(1), the petition fails to set forth sufficient reason for the granting of the petition under revised Rule 19 of this Court.

The only question really presented by this petition, viz., whether there was error in the charge of the District Court on the question of maritime indemnity, is solely dependent upon the action of this Court in respect of the petition for a writ of certiorari of Anthony Albanese, the plaintiff

herein, No. 523 on this Court's docket; for if the principal action of Anthony Albanese against respondent must be retried, the issue of respondent's right to indemnification from the co-petitioner, third-party defendant, must be determined within the context of the proof presented upon the retrial. *Fatovic* v. *Nederlandsche-Ameridaansche Stoomvart, Maatschlappij* (CA 2), 275 F. 2d 188, 191; *Bordas & Company* v. *Pizarro Serrano* (CA 1), 314 F. 2d 291.

Questions Presented

On the appeal to the Court of Appeals for the Second Circuit taken by respondent-shipowner in this case, respondent urged, in addition to error in the submission of the case to the jury on the question of indemnity, that respondent was entitled to a directed verdict against petitioner-stevedore as a matter of law. The Court of Appeals, finding error in the submission of the case to the jury under the charge on indemnification, has directed a new trial of this issue. Thus petitioner can neither complain that it has been deprived of due process of law under the Fifth Amendment to the Constitution nor of a jury trial under the Seventh Amendment.

All that is really involved in this petition for a writ of certiorari is the question whether or not the Court below erred in holding that the case was not properly submitted to the jury on the issue of indemnity. This, as above pointed out, is a moot question unless a writ should be granted on the plaintiff's petition.

Respondent challenges the statements made by petitioner under the heading "Questions Presented"; that the reversal was predicated on "an alleged erroneous charge which the record discloses was not given" (Petition, p. 2), and th t the ship's officer gave any "added assurance that he would promptly and entirely eliminate the dangerous condition" (Petition, p. 3).

What this Court meant as "conduct on its part sufficient to preclude recovery" in *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, 567, as will hereinafter be pointed out, is sufficiently made clear for the resolution of that question by the lower courts in the varying fact situations presented in particular cases. To attempt to spell out a yardstick applicable to every case under no matter what varying circumstances, would be an exercise in frustration and more confusing than helpful.

Constitutional Provisions Claimed to Be Involved

The attempt by petitioner to involve in this case the due process clause of the Fifth Amendment to the Constitution impugns the judicial integrity of the Court of Appeals for the Second Circuit.

That the right to a jury trial under the Seventh Amendment can in no wise be involved is apparent from the fact that the Circuit Court has sent the matter back for a new trial, thus preserving petitioner's right to a jury trial.

Statement of the Case

The plaintiff, Anthony Albanese, with eight other longshoremen, known as the No. 2 gang, had been working in the lower No. 2 hold of respondent's vessel since 8:00 A. M. (App. to Deft-Appellant's Brief, pp. 69a, 190a, 236a, 237a). During all of this time a hilo owned by petitioner-stevedore, which had been placed by petitioner in the lower No. 2 hold (App. to Deft-Appellant's Brief, pp. 237a, 238a) had been in continuous operation (App. to Deft-Appellant's Brief, pp. 69a, 170a). At about 10:45 A. M. a second gang of stevedores, comprised of 9 men, identified as the No. 7 gang, began working in the after half of the upper 'tween deck, employing another hilo owned by petitioner-stevedore, which had also been placed aboard to assist in the cargo operations at that level (App. to Deft-Appellant's Brief,

pp. 64a, 74a, 125a, 134a, 141a, 163a). This second hilo had been in operation for 10 to 15 minutes when the longshoremen in this gang, followed shortly thereafter by the longshoremen working in the lower No. 2 hold, began to make complaints of the density of smoke and fumes in the hold. Then, for the first time, was any request made for the ship's forced ventilating system to be put in operation (App. to Deft-Appellant's Brief, pp. 129a, 137a, 155a, 156a, 164a-165a, 171a, 267a-268a).

It is not true, as stated by petitioner, that there was unanimity of testimony that "until at least 10:45 A. M. the working conditions in the hatch were normal" (Petition, p. 5). The proof merely was that up until after the second hilo was put into operation at about 10:45 A. M. in the upper 'tween deck, no complaint had been made by any of the longshoremen working in the hold, nor any request made of the ship to put its blowers on.

The proof showed that petitioner-stevedore's ships's bosses assigned to the over-all supervision of the stevedoring operations on board ship (App. to Deft-Appellant's Brief, pp. 226a, 237a-238a), had been instructed and directed to make periodic tests of the atmosphere in the holds where hilos were working, for which purpose instruments were maintained by petitioner in the pier superintendent's desk on the pier (App. to Deft-Appellant's Brief, pp. 244a-248a).

There was testimony that at about 10:10 A. M. one of the stevedore bosses was observed in the lower No. 2 hold with this instrument, but whether he made any tests or what were the results of the tests was not disclosed. Neither of the stevedore's ship's bosses was called as a witness and no testimony was given explaining the failure to call them (App. to Deft-Appellant's Brief, pp. 150a, 172a-173a, 226a, 238a, 240a-241a, 244a-245a, 247a).

The petitioner maintained on the pier portable blowers for the purpose of exhausting fumes when hilos were work-

ing in the hold (App. to Deft-Appellant's Brief, pp. 242a, 243a). These blowers, under the instructions of the stevedore, were supposed to be put in operation whenever hilos were used (App. to Deft-Appellant's Brief, p. 243a). The proof, without contradiction, is that no portable blowers had been put in operation by petitioner, or even brought aboard the ship, prior to plaintiff's injury (App. to Deft-Appellant's Brief, pp. 135a-136a, 149a-150a, 154a, 166a, 172a).

All the conditions that existed in and about the hold had been created by the stevedore and obviously were known to it throughout its operation, including the circumstances that the after half of the upper 'tween deck was closed, that there was a rain tent over the hold and that the ship's blowers were not in operation (App. to Deft-Appellant's Brief, pp. 239a, 246a, 245a, 253a, 268a).

The proof showed that carbon monoxide does not become suddenly toxic and overpowering, but only produces its effects after continued exposure to a sufficiently high concentration over an extended period of time (App. to Deft-Appellant's Brief, pp. 81a, 83a, 102a, 103a). .01% is considered a safe working condition by the U. S. Department of Labor, and plaintiff's medical expert, Dr. Kaplan, testified that it requires an exposure to .2% for a period of an hour to make a person seriously ill (App. to Deft-Appellant's Brief, p. 83a).

There was conflict in the testimony as to whether any request was made to a ship's officer after 10:45 A. M. to turn on the ship's ventilating system. The ship's officer to whom the request was made and who allegedly told the longshoremen that he would turn on the ship's ventilating system and to keep the men working was identified only as one of the ship's mates, without regard to rank, name or other identification, other than that he weighed between 160 and 170, was middle aged and wore a uniform (App. to Deft-Appellant's Brief, pp. 127a, 128a, 140a).

The Fourth Mate, Ruter, who was assigned as cargo officer on the day in question to the forward holds including No. 2, denied that any such request was made of him (App. to Deft-Appellant's Brief, pp. 211a, 218a, 221a-222a, 223a-224a; cf. 267a-268a). He obviously did not fit the description of the person to whom the request was supposed to have been made, being a tall, thin, young man of 22 years of age. He also testified that none of the ship's officers fitted the description given by plaintiff's witnesses (App. to Deft-Appellant's Brief, p. 224a).

Under this set of facts the District Court gave the charge quoted at page 7 of the petition. It should be noted that there was in the case no evidence whatever that a ship's officer gave to the longshoremen any "added assurance that the dangerous condition would be promptly and entirely eliminated", as stated in the charge, and it should also be noted that while the charge is permissive to the extent that it allows the jury to "find that the stevedore acted to protect its men", it is mandatory in requiring the jury if they so find, to hold that "the shipowner is not entitled to recover indemnity". This portion of the charge, in addition to being at complete disparity with the evidence and unfounded, also confuses the stevedore's warranty to the shipowner with its duty to its own employees. The shipowner's right to indemnity "is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee." *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 131.

The substance of this charge clearly was that if the jury believed the testimony of the request to a ship's officer to put on the ventilating system, that as a concommitant thereof, with the implications which the Court attached to the conversation, although without support in the record, the stevedore must be absolved from liability to indemnify the shipowner.

That the Court of Appeals in referring to this instruction employed a condensed or shorthand method of reference

instead of quoting the instruction verbatim and taking it apart piece by piece cannot, it is submitted, justify the intemperate attack upon the judicial integrity of the Court of Appeals which petitioner has the temerity to make, by imputing to the Court of Appeals an absence of "fair play" and "a misreading of the record whether by carelessness or design" (Petition, p. 9). If there was any misrepresentation of the record in the present case, it was clearly done by the District Court rather than by the Court of Appeals.

Except for the dispute as to the request to a ship's mate to turn on the ventilating system, there was substantially no conflict in the evidence in this case and accordingly, for purposes of the appeal, to remove from consideration the possible contention that the respondent, as appellant in the court below, was seeking to have an appellate court weigh the evidence in a jury case, respondent made the statement as set forth in the petition at page 6. Contrary to the inference which petitioner seeks to create in its petition, the Court of Appeals accepted and took at face value the evidence against respondent in that respect, as is apparent from the quotation given by petitioner from the Court's opinion (Petition, p. 6).

Respondent has never conceded and does not concede that "the hatch boss and gangwayman *timely* complained to a ship's officer about the atmosphere in the hold", nor that they "were assured by the ship's officer that he would *rectify the situation*" (Petition, p. 7).

Argument

1. There is no question of sufficient importance for the granting of certiorari.

To liken the shorthand reference by the Court of Appeals to a clearly erroneous charge in large part unsupported by any evidence whatever in the case, to the conduct of

the Trial Court which this Court condemned in *Townsend* v. *Burke,* 334 U. S. 736, 740-741, is to say the least, shocking. Apparently petitioner feels frustrated because, having received from the District Court a charge allowing the jury to assume from the conversation with the ship's officer that the stevedore had been given "assurance that the dangerous condition would be completely and entirely eliminated" (Petition, p. 10), upon which it had obtained an unjustifiable verdict in its favor, it has been unsucceessful in defending this charge in the Court of Appeals. In consequence of that frustration, to charge the Court of Appeals with transgression of "civil rights" and "leapfrogging zeal to implement a mistaken concept of law" (Petition, p. 10) is to pass the bounds of all propriety.

It is not true that the stevedore's customer, the shipowner, directed it to do its work in a specific manner with which it supinely complied, as insinuated at page 10 of the petition; for the stevedore admitted its obligations to keep the hold area safe for the workmen (App. to Deft.-Appellant's Brief, pp. 245a-247a). All that is here involved is a contention by the stevedore that two of its subordinate employees made a request of a subordinate officer of the ship to turn on the ventilating system, that he agreed to do so and told the men to keep working. That this could constitute conduct preventing or hindering the performance by the stevedore of its contractual obligation to the shipowner is certainly not supported by anything contained in *Corbin on Contracts,* Sections 571, 947 and 1264, or *Restatement of Contracts,* Sections 295 and 315, cited by this Court in *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.,* 355 U. S. 563, 567, footnote 6, and certainly it is a far cry from anything contemplated by the *New York Uniform Commercial Code,* Section 2-316 (Petition, p. 11).

2. The decision below is not in conflict with the holdings or principles enunciated by this Court.

In *Weyerhaeuser,* the District Court had directed a verdict in favor of the stevedore-third-party defendant against

the shipowner on the question of indemnity, where the shipowner had made available to the stevedore a winch shelter which had previously been erected on the vessel at a prior point of call. This Court, in reversing and sending back for jury consideration the question of the shipowner's right to indemnity, wrote as follows (*Id.*, p. 567):

> "If in that regard respondent rendered a substandard performance which led to foreseeable liability of petitioner, the latter was entitled to indemnity absent conduct on its part sufficient to preclude recovery. The evidence bearing on these issues—petitioner's action in making the shelter on its ship available to respondent's employees in Boston although it apparently was unsafe, as well as respondent's continued use of the shelter for five days thereafter without inspection—was for jury consideration under appropriate instructions."

In holding that there were questions for jury consideration, this Court, as might well be expected, cautioned "under appropriate instructions." What is involved in the present case is not whether third-party defendant has been deprived of due process, or jury trial, but whether the question of idemnification was submitted "under appropriate instructions." That is all that is involved, and since a new jury trial has been ordered, that is all that could possibly be involved.

It should, however, be noted that it is not true, as stated by petitioner at page 12 of the petition, that in *Weyerhaeuser* the stevedore *created* the "dangerous condition." The petitioner in that case was the shipowner, as is apparent from the foregoing quotation from that case. What this Court held was that the evidence bearing on the issue, whether the shipowner's "action in making the shelter on the ship available to" the stevedore's "employees in Boston, although it apparently was unsafe",

as well as the stevedore's "continued use of the shelter for five days thereafter without investigation" was for jury consideration under appropriate instructions. In the instant case the shipowner did not supply the hilos. There was no issue vis-a-vis the shipowner and the stevedore, whether the shipowner, because it had supplied defective equipment, could be entitled to indemnity from a stevedore who had continued to use it without inspection. Here the stevedore supplied the equipment, it was chargeable with knowledge of the conditions and it controlled the workmen.

Petitioner completely misapprehends the effect of this Court's decision in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355 (Petition, pp. 11-12). In that case the Court did not hold that under no circumstances could a judgment of directed verdict be given in favor of the shipowner against the stevedore. There were two bases of liability upon which the ship, under the charge, might have been held at fault either for unseaworthiness or negligence, in either of which instance this Court indicated that the Circuit Court's decision granting a directed verdict in favor of the shipowner against the stevedore would have been justified. It was only the third possible ground of liability for unseaworthiness, namely, the defective bands which secured the bales of burlap, a condition not known to the stevedore, which this Court held could reconcile the jury's verdicts in favor of the plaintiff against the shipowner, and against the shipowner in favor of the stevedore.

It was only because there was a jury verdict on specific questions which, under the Seventh Amendment, must be sustained if reconcilable, that this Court reversed the Circuit Court of Appeals which had set aside the jury verdict in favor of the stevedore and directed judgment in favor of the shipowner. It is apparent, therefore, that petitioner's outbursts regarding a "burning desire of the

Court of Appeals for the Second Circuit to assert for itself the function of the jury and to impose liability on marine contractors", and "the supplanting of a jury by an appellate court is an invidious cancer which must be treated by this Court before it is completely metastasized" (Petition, p. 12), are entirely unwarranted.

3. The decision below is not in conflict with the decisions of other Courts of Appeals.

There is not the slightest conflict between the decision of the Court of Appeals in this case and the decisions cited by petitioner at pages 13 to 15 of its petition.

While *Moore-McCormack Lines, Inc.* v. *Maryland Ship Ceiling Co.*, 311 F. 2d 663, is concerned with the question of indemnity precluding conduct on the part of the shipowner, petitioner's analysis of that case gives a completely distorted view of the case by the elimination of the controlling factual elements upon which the decision in that case was based (Petition, p. 13). In that case the jury found that the presence of hydrogen cyanide gas in the cargo was such a latent or hidden danger as is not usually encountered by an expert and experienced ship ceiler, but was a condition of which the shipowner knew, or by the exercise of ordinary care should have known, and was not such a condition as the ship ceiling company by the exercise of reasonable care should have discovered. It was on the basis, and only on the basis of these specific findings of the jury, that the Court in that case sustained a verdict in favor of the ship ceiling company on the claim for indemnity. The principles applied by the Court in that case are in precise accord with the principles governing indemnity defeating conduct stated with a wealth of supporting authority in *Hugev* v. *Dampskisaktieselskabet International*, 170 F. Supp. 601, 610-611, aff'd sub. nom. *Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet International* (CA 9), 274 F. 2d 875, cert. den. 363 U. S. 803, cited

by this Court in *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 323, footnote 9.

In *Hodgson* v. *Lloyd Brasileiro Patrimonio Nacional*, 294 F. 2d 32, the contract between the shipowner and the stevedore specifically required the shipowner "to supply 'booms and adequate winches, in good order and with sufficient steam or current for their efficient operation * * *'" (*Id.* p. 34). The evidence in that case showed that on complaint of the stevedore, the ship had undertaken to repair the winch (*Id.* p. 34). The accident happened after the very first or second attempt to raise a load following the repair (*Id.* p. 35). Again, as in *Weyerhaeuser*, the injury-causing defect was in equipment furnished by the vessel; but in addition, in *Hodgson*, the vessel owner was contractually obligated to keep the winch in good order and it actually made a repair to it with an assurance that the winch was then in good operating condition.

In *Torres Cruz* v. *Hudson Steamship Company*, 206 F. Supp. 216, aff'd sub nom. *Hudson S.S. Co.* v. *Ayala Colon*, 314 F. 2d 44, there had been repeated requests made for the repair of the winch, repeated effort at repair, reluctance on the part of the stevedores to continue working, and a definite request by the ship's first mate to nevertheless continue. The Court of Appeals for the First Circuit placed its affirmance upon the basis that the shipowner "had contracted to keep the winch in good repair or else furnish a substitute", and that after each repair was made the shipowner gave assurance to the stevedore that the winch was sufficiently repaired and instructed the stevedore to resume operations (314 F. 2d at p. 45).

In *United States* v. *Harrison*, 245 F. 2d 911, the deck of the ship was practically covered with oil, apparently from the crankcases of the jeeps which the stevedore was supposed to unload; the gang boss and walking boss of the stevedore appealed to officers of the ship to have the condition remedied; this was not done, but the bosses and

men were urged by these officers to hasten the unloading so that the ship could go somewhere else to load; the longshoremen were told if they were careful they could work the vessel and get it out so that no delay would be incurred; thus admonished, the longshoremen agreed not to stop work on account of the dangerous condition, but to proceed. Harrison was injured as a result of working in this accumulation of grease (*Id.* p. 912) .

None of the cases cited by petitioner bear the slightest resemblance to the case at bar. In none of them was the condition created by equipment owned and employed by the stevedore and under its control, as in the case at bar.

In *Italia Societa per Azioni de Navigazione* v. *Oregon Stevedoring Company, Inc.*, 376 U. S. 315, this Court as recently as March 1964, held that a stevedore could be held liable to indemnify a shipowner where it fails to "furnish safe equipment pursuant to its contract with the shipowner, notwithstanding that the stevedore would not be liable in tort for its conduct" (*Id.* p. 320). In the instant case, the injury-producing instrument was owned and controlled by the stevedore, and placed aboard the vessel for its own convenience in the loading of cargo. The stevedore had instruments for testing the carbon monoxide content of the air; its ship's bosses were required to use these instruments to ascertain the extent of the carbon monoxide concentration in the atmosphere; the stevedore was equipped with blowers to ventilate the holds and its instructions to its employees were to employ the blowers in holds while hilos were being used; it had knowledge of the conditions existing which might produce a heavier than normal concentration of carbon monoxide, such as the partly covered upper 'tween deck and the hatch tent over the hold. Cf. *Booth Steamship Co.* v. *Meier & Oelhaf Co.*, 262 F. 2d 310.

The only question presented is whether under those circumstances a request to a ship's officer to put on the ship's blowers at a time when the heaviness of fumes in the hold

had become sufficient to disturb the workmen, and his promise to do so, could be held to excuse the stevedore for breach of its warranty of workmanlike performance. Certainly no case cited by petitioner, and nothing contained in the decision of this Court in *Weyerhaeuser*, or any decision of the lower courts subsequent to *Weyerhaeuser*, justifies such a contention.

Even where the injury-producing condition is inherent in the structure of the ship itself, it has been held that indemnity may be had where the stevedore fails to observe the condition and allows its workmen to use the defective structure, *Smith* v. *Jugosalvenska Linijska Plovidea* (CA 4), 278 F. 2d 176. To the same effect, see also *Calmar S.S. Co.* v. *Nacirema Operating Co.*, 266 F. 2d 79, cert. den. 361 U. S. 816 and *American Export Lines* v. *Revel*, 266 F. 2d 82, 87.

Clearly there is no conflict between the instant decision and the decision of the Second Circuit in *Misurella* v. *Isthmian Lines, Inc.*, 328 F. 2d 40. In endeavoring to reach for such a conflict, petitioner refers to the decision of Judge Weinfeld in the District Court (215 F. Supp. 857), but fails to point out that Judge Weinfeld based his decision upon the premise that:

> "The warranty was effective the moment the stevedore boarded the vessel to perform its services. Indeed, the short of it is that if the hold was an unsafe area for the men to work in, or by the use of hi-los would be so rendered, they should not have been permitted to start the job until proper ventilation was in effect." (215 F. Supp. 862-863)

In affirming Judge Weinfeld's decision, the Circuit Court practically reiterated the language used in the present case, saying:

> "In any event, we should find insuperable difficulty to any holding that the owner here prevented or hindered

> a workmanlike performance by the stevedore, for the stevedore could itself have provided workable ventilating equipment as was often done where a ship failed to do so, or shut down the hi-los until the deck house key was produced." (328 F. 2d at p. 42)

In both *Misurella* and in the present case, requests were made of the ship's officers to turn on the ventilators. In neither case did the stevedore do more, and in both cases this has been held by the Court of Appeals to be insufficient to defeat indemnity, and, we submit, properly so under the doctrine of a stevedore's warranty of workmanlike service, as heretofore enunciated and applied by this Court.

4. No clarification of the type of conduct on the part of a shipowner which is sufficient to preclude indemnity is required.

Contrary to petitioner's suggestion, the lower courts have in innumerable instances, as is evident from the cases heretofore cited in this brief, found it possible to fashion a rule governing indemnity precluding conduct on the part of the shipowner without further clarification or further elaboration from this Court. Certainly nothing is contained in the cases cited by petitioner at pages 15 and 16 of its petition, to indicate any urging by the lower courts, that such clarification is necessary or desirable. In the District Court opinion in *Misurella* v. *Isthmian Lines, Inc.*, 215 F. Supp. 857, 861, Judge Weinfeld, following the quotation given by petitioner at page 16 of its petition, goes on to say, citing numerous cases in the footnotes: "The teaching of *Crumady* v. *The Joachim Hendrik Fisser* and its progeny is that the mere fact the shipowner was at fault does not, in and of itself, bar indemnity. Neither does the circumstance, as here argued by the stevedore, that the shipowner 'was at least a joint and concurring wrongdoer' defeat recovery."

In the affirmance of the *Misurella* decision, as above pointed out, the Circuit Court had no doubt whatever on the subject. Similarly in *McNamara* v. *Weichsel Dampschiffahrts,* 293 F. 2d 900, 903, where, under under a most peculiar fact situation, the Court made the comment stated by petitioner with respect to difficulties in determining what conduct is sufficient to defeat the right to indemnity and sent the case back for a new trial because improperly submitted to the jury on that issue; in affirming a judgment on retrial, the Court had no difficulty whatever in finding that the ship's conduct did not preclude indemnity, *McNamara* v. *Weichsel Dampschiffahrts,* 339 F. 2d 475.

There is nothing in the decision of the Court of Appeals in the instant case nor in the decision in *Mortensen* v. *A/S Glittre,* 348 F. 2d 383, cited by petitioner at page 16, to indicate any need or desire for clarification of this Court's decision in *Weyerhaeuser.* In any event, in the light of *Weyerhaeuser* and the cases which have applied its principle, the present case does not afford an appropriate medium for a clarification of the principle, if any should be desirable.

CONCLUSION

For the reasons above stated, the petition of International Terminal Operating Co., Inc. for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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